BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PAUL M. WATKINS	)	
Claimant	)	
VS.	)	
	)	Docket No. 236,393
SHAWNEE COUNTY REFUSE DEPARTMENT	)	
Respondent	)	
Self Insured	)	

ORDER

Respondent appealed the September 24, 1999 Award entered by Administrative Law Judge Bryce D. Benedict. The Appeals Board heard oral argument on January 18, 2000.

APPEARANCES

Dan E. Turner of Topeka, Kansas, appeared on behalf of claimant. Jeff K. Cooper of Topeka, Kansas, appeared on behalf of respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. At oral argument before the Appeals Board, the parties agreed that there were neither any issues concerning what evidence was considered or not considered by the ALJ as enumerated in the Award nor were there any issues concerning the ALJ's evidentiary rulings.

ISSUES

The ALJ found claimant was permanently and totally disabled as a direct result of the September 3, 1996 work related accident. The ALJ further found that the October 25, 1996 incident resulted from a natural progression of the work related injury and did not constitute an intervening accident. The maximum award for a permanent total disability

of $125,000[1] was reduced by the 10 percent functional impairment the ALJ found preexisted the work related accident.[2]

Respondent's Application for Review by the Workers Compensation Appeals Board states that the issues presented for review by respondent include:

> "All findings and decisions contained in said Award, including but not limited to:
> A. Whether claimant sustained an intervening injury on October 25, 1996.
> B. Nature and extent of impairment."

Neither party filed a brief to the Board so the Board did not have any further description of the specific "findings and decisions" respondent was challenging. During oral argument to the Board, however, respondent clarified that nature and extent of disability and whether claimant sustained a subsequent injury were the only issues for Appeals Board review. Also during oral argument, claimant raised an issue concerning the ALJ's finding of a 10 percent preexisting impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the arguments of the parties, the Appeals Board finds that the ALJ's Award should be modified to an award for permanent partial disability based upon the percentage of claimant's increase in functional impairment, but should otherwise be affirmed.

The Appeals Board agrees with and adopts the ALJ's findings of fact and conclusions of law except that the Appeals Board does not agree that claimant has proven that he is permanently and totally unable to engage in any type of substantial, gainful employment or that he is realistically unemployable.[3] The Appeals Board also disagrees with the ALJ's conclusion that claimant does not have the burden of proving that there are no jobs available to him which are within his restrictions and within his labor market. The decision cited by the ALJ, Slack v. Theis Development Corp., 11 Kan. App. 2d 204, 718 P.2d 310 (1986), dealt with a different statute and does not apply to the version of the permanent partial disability statute, K.S.A. 1996 Supp. 44-510e, applicable to this case.

The Workers Compensation Act places the burden of proof upon claimant to establish his or her right to an award of compensation and to prove the conditions on which

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[1] K.S.A. 44-510f(1).

[2] K.S.A. 1999 Supp. 44-501(c).

[3] K.S.A. 44-510c and Wardlow v. ANR Freight Systems, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

that right depends.[4] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[5] The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.[6]

In this case, claimant would be entitled to a permanent partial general disability award based on his percentage of work disability if it exceeded his percentage of functional impairment.[7] However, claimant did not offer any evidence in the opinion of a physician as to the percentage of tasks he has lost the ability to perform from the work tasks he performed during the 15-year period before the accident. Furthermore, although claimant is not working, and therefore has an actual wage loss of 100 percent, the Court of Appeals has held that before a claimant's actual wage loss can be used for purposes of the wage loss prong of K.S.A. 44-510e, a finding must first be made that claimant has made a good faith effort to find appropriate employment after recovering from his injury.[8]

In Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that the employer offered that paid a comparable wage. The Court then imputed the comparable wage claimant would have earned had she accepted the offered accommodated employment. In Copeland, the Court held that for purposes of the wage loss prong of K.S.A. 44-510e, a worker's post injury wage will be based upon ability rather than actual wages when the worker failed to put forth a good faith effort to find appropriate employment after recovering from the injury.

> "If a finding is made that a good faith effort has not been made, the fact finder will have to determine an appropriate post injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages . . ."[9]

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[4] K.S.A. 1999 Supp. 44-501(a); see also Chandler v. Central Oil Corp., 253 Kan. 50, 853 P.2d 649 (1993) and Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

[5] K.S.A. 1999 Supp. 44-508(g). See also *In re* Estate of Robinson, 236 Kan. 431, 690 P.2d 1383 (1984).

[6] K.S.A. 1999 Supp. 44-501(g).

[7] K.S.A. 1996 Supp. 44-510e(a).

[8] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[9] Copeland at 320.

In this case the ALJ found that claimant had acted in good faith, but the Appeals Board disagrees. Claimant has made absolutely no effort to find work of any kind. Instead, he has been content to remain unemployed and receive disability retirement benefits. Although it may be true that those benefits exceed what the claimant could earn in the open labor market, that is irrelevant to a determination of good faith for purposes of workers compensation. While this may make claimant's decision not to seek work understandable, even reasonable, it does not satisfy the policy considerations announced in Foulk upon which the good faith requirement announced in Copeland was based.

> "[I]t would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system."[10]

Claimant's decision not to seek work was most likely motivated by his desire to take advantage of a disability retirement option and was not intended to take advantage of or manipulate the workers compensation system. But that would be the result if we were to use his actual post-injury earnings in the work disability formula. Retirement alone will not defeat a claim for work disability, but neither will it create one.[11] Furthermore, claimant's retirement was based on his disability so, unlike where the retirement is based on age, there is no provisions for a credit or offset.[12] Imputing a wage based on ability may not be appropriate where the legislature has provided an alternate remedy.[13] But the facts of this case fit within the rationale of Copeland, and a wage based on claimant's ability should, therefore, be imputed.

To receive workers compensation benefits, the claimant must show a "personal injury by accident arising out of and in the course of employment."[14] The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact.[15]

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[10] Syl. ¶ 4.

[11] *See* Lynch v. U.S.D. No. 480, 18 Kan. App. 2d 130, 850 P.2d 271 (1993); Brown v. City of Wichita, 17 Kan. App. 2d 72, 832 P.2d 365 *rev. denied* 251 Kan. 937 (1992). *See also*, Gadberry v. R. L. Polk & Co., 25 Kan. App. 2d 800, 975 P.2d 807 (1998).

[12] K.S.A. 44-501(h).

[13] Green v. City of Wichita, 26 Kan. App. 2d 53, 977 P.2d 283, *rev. denied* ___ Kan. ___ (1999).

[14] K.S.A. 1999 Supp. 44-501(a); Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 197, 689 P.2d 837 (1984).

[15] Harris v. Bethany Medical Center, 21 Kan. App. 2d 804, 805, 909 P.2d 657 (1995).

In Kindel v. Ferco Rental, Inc., 258 Kan. 272, 278, 899 P.2d 1058 (1995), the Supreme Court stated the general principles for determining whether a worker's injury arose out of and in the course of employment:

> The two phrases arising "out of" and "in the course of" employment, as used in our Workers Compensation Act, K.S.A. 44-501 *et seq*., have separate and distinct meanings; they are conjunctive, and each condition must exist before compensation is allowable. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to each case.[16]

The phrase "arising out of" employment requires some causal connection between the injury and the employment.[17]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[18] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[19]

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[20] It is not compensable, however, where the worsening or new injury would

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[16] Newman v. Bennett, 212 Kan. 562, 568, 512 P.2d 497 (1973).

[17] Pinkston v. Rice Motor Co., 180 Kan. 295, 302, 303 P. 2d 197 (1956).

[18] Odell v. Unified School District, 206 Kan. 752, 481 P.2d 974 (1971).

[19] Woodward v. Beech Aircraft Corp., 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

[20] Jackson v. Stevens Well Service, 208 Kan. 637, 493 P.2d 264 (1972).

have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.[21]

The Appeals Board finds claimant did not sustain a new injury on October 25, 1996. The worsening claimant experienced on that date when he bent over in the shower was a direct and natural result of his September 3, 1996 work-related injury.

The Appeals Board agrees with the ALJ that Dr. Abrams' restrictions are the best measure of claimant's current abilities and that claimant has not established that there are no jobs available to him which are within his restrictions. Dr. Abrams' restrictions included that claimant not lift over 25 pounds and recommended claimant not twist or bend such as a mechanic would do, and no crawling, climbing or stooping. Standing was limited to no more than 1 hour in an 8 hour day. From the record presented the Appeals Board finds claimant's wage earning ability is in the range of minimum wage and, therefore, finds he retains the ability to earn $206 per week. When compared to his average weekly wage of $469.33 this represents a 56 percent wage loss. Claimant has not presented any evidence concerning, and therefore has not proven, his loss of task performing ability. Therefore, the Appeals Board finds claimant's tasks loss to be 0 percent. When this 0 percent task loss is averaged with his 56 percent wage loss claimant has a work disability of 28 percent.

Considering the various opinions, the Appeals Board finds claimant's current total impairment is 40 percent. The Appeals Board further agrees with the ALJ that the claimant's preexisting functional impairment was 10 percent. Thus, the permanent impairment attributable to this accidental injury is 30 percent. K.S.A. 44-510e(a) provides: "In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment." As claimant's functional impairment exceeds this 28 percent work disability, he is entitled to an award based upon the percentage of functional impairment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict dated September 24, 1999, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Paul M. Watkins, and against the respondent, Shawnee County Refuse Department, for an accidental injury which occurred September 3, 1996, and based upon an average weekly

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[21] Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997); Stockman v. Goodyear Tire & Rubber Co., 211 Kan. 260, 505 P.2d 697 (1973). *See also* Bradford v. Boeing Military Airplanes, 22 Kan. App. 2d 868, 924 P.2d 1263, *rev. denied* 261 Kan. 1082 (1996).

wage of $469.33 for 59.3 weeks of temporary total disability compensation at the rate of $312.90 per week or $18,554.97, followed by 111.21 weeks at the rate of $312.90 per week or $34,797.61, for a 30% permanent partial disability, making a total award of $53,352.58, which is ordered paid in one lump sum less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of October 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dan E. Turner, Topeka, KS
Jeff K. Cooper, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director